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Public Prosecutor v Suahaili bin Hassan & Anor

B HIGH COURT (TAWAU) — CASE NO TWU-45SO–16/8 OF 2017
ALWI ABDUL WAHAB JC
22 FEBRUARY 2018

C *Criminal Procedure — Sentencing — Appropriate sentence — Whether geographical boundaries affecting sentencing — Whether plea of guilty accepted — Whether term of imprisonment appropriate and reasonable — Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 s 26A*

D The first and second accused in the present case were charged under s 26A of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('the ATIPSOM'). The case was fixed for trial on 15 January 2018. Before the trial took off, learned counsel for the first and second accused had indicated to the court that his clients wished to change their plea of not guilty to a plea of guilty. E The charge was then read and explained to both accused in Bahasa Malaysia and they pleaded guilty to the charge accordingly. The issue was on the term of imprisonment should be imposed to both accused.

F **Held**, convicting the accused and sentencing the accused with six years imprisonment:

(1) In passing sentence, the court must consider the geographical boundaries of the territorial state of Sabah particularly the district of Tawau. Its coastal areas were wide and long as well as close to the neighbouring countries namely Indonesia and Philippines which made such G cross-border migration became so easy through 'jalan tikus' (see para 14).

(2) Based on the trend of sentencing by the court in the past for such an offence of smuggling under s 26A of the ATIPSOM, the sentence meted out by the court in 2016 and 2017 was between four to five years of imprisonment and in a recent case of similar nature, the court sentence H the accused to six years of imprisonment. The imprisonment sentence of between six to ten years was appropriate due to the frequency of such offence being brought to the court (see para 15).

I (3) It must not be denied that the accused's plea of guilty had in a way speed up the disposal of the case and save a lot of time to everyone. Based on the circumstances, the court was of the view that six years imprisonment was reasonable and appropriate (see para 16).

[Bahasa Malaysia summary

Tertuduh pertama dan tertuduh kedua dalam kes semasa telah didakwa di bawah s 26 Akta Antipemerdagangan Orang dan Antipenyeludupan Migran 2007 ('ATIPSOM'). Kes telah ditetapkan untuk perbicaraan pada 15 Januari 2018. Sebelum perbicaraan bermula, peguam terpelajar yang mewakili tertuduh pertama dan tertuduh kedua telah memberitahu mahkamah kedua-dua mereka ingin menukar pengakuan tidak bersalah kepada pengakuan bersalah. Pertuduhan telah dibaca dan diterangkan kepada kedua-dua tertuduh dalam Bahasa Malaysia dan kedua-duanya kemudian mengaku salah atas pertuduhan tersebut. Isu yang berbangkit adalah berkenaan dengan tempoh masa hukuman penjara yang dikenakan kepada dua-dua tertuduh.

Diputuskan, mensabitkan tertuduh dan menjatuhkan hukuman enam tahun penjara kepada tertuduh:

(1) Dalam menjatuhkan hukuman, mahkamah mesti mengambil kira batas-batas geografi negeri Sabah terutamanya di daerah Tawau. Kawasan pesisiran yang luas dan panjang serta berdekatan dengan negara-negara jiran terutamanya Indonesia dan Filipina menyebabkan mudahnya terjadi migrasi merentasi sempadan melalui 'jalan tikus' (lihat perenggan 14).

(2) Berdasarkan trend hukuman yang diputuskan oleh mahkamah atas kesalahan-kesalahan lalu di bawah s 26 ATIPSOM pada tahun 2016 dan 2017, hukuman yang biasanya dikenakan adalah di antara empat hingga enam tahun penjara. Hukuman penjara antara enam hingga sepuluh tahun penjara adalah berpatutan disebabkan kekerapan kesalahan ini di bawah ke mahkamah (lihat perenggan 15).

(3) Adalah tidak dinafikan bahawa pengakuan bersalah tertuduh telah dapat mempercepatkan masa penyelesaian kes dan menjimatkan masa kesemua pihak yang terlibat. Berdasarkan faktor ini, mahkamah berpendapat hukuman enam tahun penjara adalah berpatutan dan munasabah (lihat perenggan 16).]

Notes

For cases on appropriate sentence, see 5(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4287–4282.

Cases referred to

Hardi Banggulung v Pendakwaraya (J-05(H)-21–01 of 2017 (IDN)) (unreported), CA (refd)

Mohd Tahir Bahtiar dan satu lagi lwn Pendakwa Raya dan satu lagi [2018] MLJU 257, CA (refd)

Nurul Islam lwn Pendakwa Raya [2016] 12 MLJ 433, HC (refd)

Pendakwa Raya v Marwan Sirait (W/Indonesia) [2017] MLJU 559; [2017] 1 LNS 649, HC (refd)
Pendakwaraya v Abdullah bin Wajid & Mr Wichai (K-05(H)-301–08 of 2016) (unreported), CA (refd)
PP v Nawi & Ali (Criminal Appeal No B-05(H)-118–03 of 2017 (IDN)) (unreported), CA (refd)

Legislation referred to

Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 s 26A
Evidence Act 1950 s 57(1)(j)

Khairunnizam bin Mohd lderis (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
Kamarudin bin Mohmad Chinki (Ram Singh with him) (Chang & Kamarudin) for the first and second accused.

Alwi Abdul Wahab JC:

[1] The first and second accused in the present case were charged under s 26A of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('the ATIPSOM') (Act 670) as follows:

> Bahawa kamu bersama-sama pada 1hb. Mac, 2017 jam lebih kurang 3.00 pagi bertempat di Jalan Felda Sahabat 55 dalam daerah Lahad Datu dalam negeri Sabah, dalam melanjutkan niat bersama kamu telah didapati teribat dalam aktiviti penyeludupan Migran, iaitu melibatkan 6 imigran yang diseludup menggunakan kenderaan jenis Isuzu Dimax warna putih no. pendaftaran SD2187H bernama seperti mana Lampiran A. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 26A ATIPSOM 2007 yang boleh dihukum di bawah Akta yang sama dan dibaca bersama dengan seksyen 34 Kanun Kesiksaan.

[2] The case was fixed for trial on 15 January 2018. Before the trial takes off, learned counsel for the first and second accused had indicated to the court that his clients wished to change their plea of not guilty to a plea of guilty. The charge was then read and explained to both accused in Bahasa Malaysia and they pleaded guilty to the charge accordingly.

[3] The facts of the case and the exhibits were tended and marked by the court. The court also heard the mitigation from learned counsel on behalf of the first and second accused. Before the sentence was passed against the first and second accused, it was brought to my attention by the learned DPP that the sentence to be passed should not be less than ten years based on the Court of Appeal's case of *Public Prosecutor v Nawi & Ali* (Criminal Appeal No B-05(H)-118–03 of 2017 (IDN)) (unreported) handed down on 11 December 2017.

[4] In *Nawi & Ali's* case, the Court of Appeal had increased the sentence of six years imposed by the High Court for the offence under s 26A of the ATIPSOM to ten years imprisonment. In light of the said Court of Appeal's case, this court deferred the sentence to be meted out against both the first and second accused to allow for both parties to submit on the issue whether this court ought to follow the decision of the Court of Appeal's in enhancing the sentence to ten years imprisonment.

[5] The learned DPP submitted that the imprisonment sentence to be imposed by this court should be ten years following *Nawi & Ali*'s case. This is due to the seriousness of the offence committed by the first and second accused which involved national security and the sovereignty of this country. He further submitted that any imprisonment term of less than ten years would be 'manifestly inadequate'. He then listed out few other cases decided by the Court of Appeal namely:

(a) *Mohd Tahir Bahtiar dan satu lagi lwn Pendakwa Raya dan satu lagi* [2018] MLJU 257;

(b) *Hardi Banggulung v Pendakwaraya* (J-05(H)-21–01 of 2017 (IDN)) (unreported);

(c) *Pendakwaraya v Abdullah bin Wajid & Mr Wichai* (K-05(H)-301–08 of 2016) (unreported); and

(d) *Nurul Islam lwn Pendakwa Raya* [2016] 12 MLJ 433.

[6] In *Mohd Tahir* and *Hardi Banggulung*'s cases the Court of Appeal affirmed the ten years imprisonment imposed by the High Court which was given on 23 November 2017. In *Pendakwaraya v Abdullah bin Wajid & Mr Wichai*, the Court of Appeal enhanced the sentence from four years to eight years imprisonment for the same offence under s 26A of the ATIPSOM which decision was given on 5 December 2016. In *Nurul Islam lwn Pendakwa Raya*, the Court of Appeal affirmed the ten years imprisonment imposed by the High Court for the same offence under s 26A of the ATIPSOM.

[7] Learned counsel for the first and second accused, on the other hand, cited the case of *Pendakwa Raya v Marwan Sirait (W/Indonesia)* [2017] MLJU 559; [2017] 1 LNS 649 where the accused was sentenced to six years imprisonment after he pleaded guilty to an offence under s 26A of ATIPSOM. The learned counsel for the first and second accused further submitted that the Court of Appeal's case of *Nawi & Ali* must be distinguished with the present case for the apparent reason that *Nawi & Ali*'s case and the other three cases cited by the learned DPP took place in Semenanjung Malaysia whereby this case happened in Tawau, Sabah. He urged the court to take into consideration the geographical boundaries of the state of Sabah particularly the district of Tawau

pursuant to s 57(1)(j) of the Evidence Act 1950 as an important factor to be considered before sentence is imposed on the first and second accused.

[8] Learned counsel also distinguished the present case with the case of *Marwan Sirait* cited by them and also *Nurul Islam* cited by learned DPP. In *Nurul Islam*, the accused was charged with three charges for the offence under s 26A of the ATIPSOM and the case involved the operation of a syndicate which smuggling in a large number of illegal immigrants whereas in *Marwan Sirait*'s case as well as in the present case, the accused operated individually and in duo, a rather less extensive than the syndicate operations.

[9] It was also argued by learned counsel for the first and second accused that there were no grounds of judgment given by the Court of Appeal in *Nawi & Ali*'s case as to why the sentence of ten years imprisonment was meted out.

[10] Besides the difference in the geographical boundaries between Semenanjung Malaysia and Sabah, learned counsel for the first and second accused also raised the point that the six illegal immigrants who were smuggled by the first and second accused heading towards Lahad Datu were actually the relatives and family members of the second accused who had just arrived from the Philippines through what is known as 'jalan tikus' (unauthorised route) at the shore of Kampung Tulibas Besar.

[11] Learned counsel for the first and second accused also urged this court to consider the role of first and second accused in the commission of the offence. The first accused was merely a driver and the second accused was the passenger together with the rests of her family members who were transported in the said vehicle.

[12] There was no torturing of the so-called six victims of the illegal immigrants as in the real case of human trafficking and smuggling of migrants because they are the second accused's family members who came in and out of Sabah's shores due to the geographical boundaries. As clearly stated in the facts of the case, the second accused was merely asking the first accused for help to transport her family members who had just arrived from the Philippines. Hence there is no element of profit-making that benefitted both the first and second accused in the present case.

[13] It is also clear that the case of *Nawi & Ali*, *Mohd Tahir*, *Hardi Banggulung* and *Nur Islam*, the offences were all committed in Semenanjung Malaysia and the Court of Appeal having not consistent in giving ten years imprisonment as can be seen in the case of *Pendakwaraya v Abdullah bin Wajid and Mr Wichai* where the Court of Appeal enhanced the sentence on both

accused to eight years imprisonment after they pleaded guilty in trafficking 18 illegal immigrants from Myanmar.

[14] I am of the view and as rightly pointed out by learned counsel for the first and second accused, in passing sentence, this court must consider the geographical boundaries of the territorial state of Sabah particularly the district of Tawau. Its coastal areas are wide and long as well as close to the neighbouring countries namely Indonesia and Philippines which makes such cross-border migration became so easy through 'jalan tikus'.

[15] Looking at the trend of sentencing by this court in the past for such an offence of smuggling under s 26A of the ATIPSOM, the sentence meted out by this court in 2016 and 2017 is between four to five years of imprisonment and in a recent case of similar nature, this court sentence the accused to six years of imprisonment. In my view, the imprisonment sentence of between six to ten years is appropriate due to the frequency of such offence being brought to this court.

[16] It must not be denied that the accused's plea of guilty has in a way speed up the disposal of the case and save a lot of time to everyone. In the circumstances of the present case and having considered the mitigation by the first and second accused, I am of the view that six years imprisonment is reasonable and appropriate.

[17] I therefore accept both accused's pleas of guilty and convict them accordingly. I sentence each of them to six years imprisonment with effect from the date of arrest.

Accused convicted and sentenced with six years imprisonment.

Reported by Mohd Kamarul Anwar